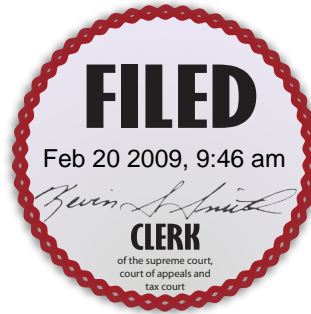


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ALVA LESLIE FUNK
Greencastle, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

THOMAS D. PERKINS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ALVA LESLIE FUNK,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

)
)
)
)
)
)
)
)
)
)
)

No. 79A05-0807-PC-383

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas Busch, Judge
Cause No. 79D02-0511-FC-99

February 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Alva Leslie Funk, pro se, appeals the denial of his petition for post-conviction relief.

We affirm.

ISSUE

Whether the post-conviction court erred when it concluded that Funk had failed to establish ineffective assistance of appellate counsel.

FACTS

Funk and the driver of a vehicle in which he was the passenger refused a police order to stop and engaged in a high speed chase, pursued by numerous police units. Eventually, the vehicle was surrounded by the police and stopped. At that point, Funk pointed a gun at two different officers. *Funk v. State*, No. 79A04-9307-CF-249 (Ind. Ct. App. Dec. 12, 1994), *trans. denied*. The vehicle again sped away and was involved in a collision. The driver and Funk were removed from the vehicle, and a gun containing four rounds of ammunition was found on the passenger-side floorboard. *Id.* Funk was tried by a jury, which found him guilty of two counts of intimidation while armed with a deadly weapon, class C felonies; two counts of resisting law enforcement while armed with a deadly weapon, class D felonies; one count of resisting law enforcement, a class A misdemeanor; and three counts of criminal recklessness while armed with a deadly weapon, class D felonies; and adjudicated to be an habitual offender. At sentencing, the trial court merged five of the eight offenses, and ordered Funk to serve an aggregate sentence of forty-seven years.

Funk appealed, arguing *inter alia* that he received ineffective assistance of trial counsel when counsel

failed: 1) to lay a proper foundation for the admission of impeachment evidence; 2) to lay a proper foundation for the admission of substantive evidence; 3) to interview and depose a witness who was unavailable for trial due to military duty; 4) to draft an adequate motion for continuance; and 5) to rehabilitate a defense witness whose credibility was impeached by the State.

Id., slip op. 6-7. We found that Funk failed to rebut the presumption of competent representation, and that he also failed to establish reversible error on the other issues he raised. *Id.*

On September 20, 2005, Funk filed his pro se amended petition for post-conviction relief. Funk alleged that:

- (1) he was denied counsel at the arraignment hearing;
- (2) the trial court improperly instructed the jury on accomplice liability;
- (3) the habitual offender information – which alleged that Funk had accumulated “at least” four (4) prior unrelated felony convictions – was fatally defective because the language “at least” did not track the language of the habitual offender statute and did not allow him to prepare a defense;
- (4) the habitual offender information, which was amended on the day of the habitual offender phase of the trial, was improperly amended because the amendment was not reflected in the chronological case summary and because he was not given notice of the amendment or a chance to contest it;
- (5) the trial court denied him the defense of laches in the habitual offender phase of the trial;
- (6) his habitual offender enhancement was improper because the trial court did not use the amended habitual offender statute, which was effective July 1, 1993, during his April 1993 sentencing hearing;
- (7) his trial counsel was ineffective for failing to object or raise the errors alleged in (1) – (6);
- (8) his appellate counsel was ineffective for failing to raise issues (1), (5), and (6) on appeal and ineffective for failing to raise issues (2) - (4) under the ineffective assistance of trial counsel argument on appeal;
- (9) his post-conviction counsel, who withdrew from his previously filed post-conviction petition, was ineffective because she had informed him that the issues raised in his previous post-conviction petition had no

merit; and (10) he was improperly sentenced pursuant to *Blakely v. Washington*.

Funk v. State, No. 79A02-0605-PC-382, slip op. at 5-6 (Ind. Ct. App. Apr. 17, 2007). After receiving affidavits from Funk (but not the State), and pursuant to Indiana Post-Conviction Rule 1(9)(b), the post-conviction court denied him relief. Funk appealed, and we affirmed except for the allegations of ineffective assistance of appellate counsel. We held that the post-conviction court should have addressed the merits of Funk’s claim and remanded “for the entry of specific findings of fact and conclusions of law on Funk’s ineffective assistance of appellate counsel claim.” *Id.* at 20, 21.

The post-conviction court held a hearing on March 13, 2008. Funk’s appellate counsel, Steve Knecht, testified concerning his representation of Funk approximately fourteen years earlier.

As to Funk’s first claim of error pertaining to his lack of counsel at the initial hearing, Knecht testified that the initial hearing was “not a critical part of the proceeding” and being without counsel did not jeopardize Funk’s case. (Tr. 11). Knecht was asked to respond to Funk’s second claim – that appellate counsel should have argued that trial counsel was ineffective for not objecting to or correcting the accomplice liability instruction, and the jury instruction was admitted into evidence at the hearing. Knecht opined that there was nothing to argue since the jury instruction was “a correct statement of the law.” (Tr. 15). Knecht was asked to address Funk’s third claim – that appellate counsel should have argued that trial counsel was ineffective for not challenging the habitual offender information as being “deficient,” and the information was introduced

into evidence at the hearing. *Id.* Knecht responded that the charging information, with four unrelated felonies and their respective offense and conviction dates, “appear[ed] to be in compliance with the statute,” and it advised Funk of “what he was charged with.” (Tr. 18). In response to Funk’s claim that appellate counsel should have argued that trial counsel was ineffective for not seeking a continuance when the habitual offender information was amended, Knecht testified that his review of the transcript led him to believe that no continuance was sought because trial counsel had adequate time to prepare for trial and was “ready to go.” (Tr. 19). Knecht was asked about Funk’s fourth claim – that appellate counsel should have objected to the State amending the information because the amended habitual information allowed the jury to find him not to be an habitual offender “if the State only proved three felony convictions.” (Tr. 20). In response, Knecht testified that it was “the instructions that would advise the jury as to how they were to proceed in reaching a verdict, not . . . the charging information,” and that after reviewing the habitual offender jury instructions, he found no grounds to argue for reversal. (Tr. 20). When asked whether he should have asserted that trial counsel was ineffective for not having argued that Funk was not given timely notice of the amendment to the habitual offender information, Knecht responded that “the amended count simply removed one of the underlying felonies that had been alleged in the original habitual offender filing,” which “would make that a non-issue” for appeal. (Tr. 24).

As to Funk’s fifth claim – that appellate counsel should have argued that Funk was “denied a defense” by trial counsel’s failure to challenge the amended information, Knecht opined that to argue trial counsel’s strategy in that regard “would be speculation.”

(Tr. 24, 26). As to Funk's sixth claim – that appellate counsel should have argued that Funk "was entitled to be sentenced under the Ameliorative Amendment of the Habitual Statute," (Tr. 27, quoting Funk's petition), Knecht opined that the 1993 amendment to the habitual offender statute did not apply to Funk.

On May 21, 2008, the post-conviction court issued its findings of fact and conclusions of law. It found that Funk's claim that he received ineffective assistance of appellate counsel for failure to argue that Funk was entitled to counsel at the initial hearing failed because the initial hearing was "not a critical stage requiring presence of counsel"; and "no actions were taken at the initial hearing in this case that could have presented any risk that [Funk] would convict himself due to his own ignorance." (App. 13). As to Funk's claim that appellate counsel was ineffective for failing to argue trial counsel's failure to object to the accomplice liability jury instruction or offer a proper instruction, the post-conviction court found that the "instruction submitted to the jury was a correct statement of the law," and "there was nothing to appeal on this issue." (App. 14). The post-conviction court found that Funk's claim that appellate counsel was ineffective for not arguing trial counsel's failure to challenge the "deficient" habitual offender information failed because (1) the "charge clearly presented the prior convictions that [Funk] was alleged to have had, it followed the statute and clearly advised [Funk] of the allegations it contained," and it "further described what the State had to show to obtain a conviction"; and (2) "the State's later amendment to the charge was in [Funk]'s favor, therefore he did not suffer any prejudice." (App. 14) (emphasis in original). As to Funk's claim that appellate counsel should have argued trial counsel's

ineffectiveness for “not objecting” to the amended habitual offender information because the CCS showed that the original charging information was “never amended,” the post-conviction court noted that Funk’s own brief acknowledged the amendment, and that “the amendment to the charge was in [Funk]’s favor. (App. 14) (emphasis in original). As to Funk’s claim that appellate counsel was ineffective for not arguing that he was “denied a defense” in the habitual offender phase of the proceeding because he had “a right to be heard by himself and counsel,” the post-conviction court found “no discernable legal principles” in this claim that warranted relief. (App. 15). Finally, as to Funk’s claim that he was “entitled to be sentenced under the ‘Amerlioratory [sic] Amendment’ of the habitual statute,” the post-conviction court found that there was “nothing ameliorative about” the 1993 statutory amendment, and it did not apply to Funk’s sentencing.

The post-conviction court held that Funk had failed to meet his burden of proof and denied his petition.

DECISION

In a post-conviction relief proceeding, the petitioner bears the burden of establishing the grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* Therefore, in order to prevail on his appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Where, as here, the post-conviction court made findings of fact and conclusions of law, its “findings

and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made.” *Id.* at 643 (citing *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)). Further, the post-conviction court “is the sole judge of the weight of the evidence and credibility of witnesses.” *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

The standard of review for a claim of ineffective assistance of appellate counsel is two-pronged. *Henley*, 881 N.E.2d at 644. To establish the first prong requires showing “deficient performance: representation that fell below an objective standard of reasonableness.” *Id.* To satisfy the second prong requires a showing of “prejudice: a reasonable probability, *i.e.*, a probability sufficient to undermine confidence in the outcome that, but for counsel’s errors, the result of the proceeding would have been different.” *Id.*

To show at the post-conviction stage that appellate counsel was ineffective for failing to raise an issue on appeal, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. *Henley*, 881 N.E.2d at 645 (citing *Ben-Yisrayl*, 745 N.E.2d 253, 260-61 (Ind. 2000)). To prevail on a claim of ineffective assistance of appellate counsel for failure to raise an issue requires satisfying both “the performance prong and the prejudice prong,” and “failure to satisfy either prong will cause the claim to fail.” *Id.*

Funk first argues that his “appellate counsel was ineffective when he failed to raise on Funk’s direct appeal that Funk was denied his right to counsel at his arraignment hearing.” Funk’s Br. at 9. However, the hearing to which Funk refers was his initial

hearing, wherein the trial court advised him of his rights and the charges filed against him. *See* Ind. Code § 35-33-7-5. The Sixth Amendment requires the assistance of counsel at all critical stages of proceedings. *Hernandez v. State*, 761 N.E.2d 845, 849 (Ind. 2002). A “critical stage” is “any stage where (1) incrimination may occur or (2) where the opportunity for effective defense must be seized or foregone.” *Id.* at 850. As the post-conviction court correctly concluded, that which took place at Funk’s initial hearing (consistent with the law in place at the time¹), did not constitute a critical stage that required the presence of counsel for Funk. Hence, his first argument must fail.

Funk next argues that appellate counsel was ineffective “when he failed to raise” the issue of the trial court’s failure to instruct the jury that in order to be convicted as an accomplice, “the person that committed the crime” had “to have the mens rea element of ‘knowingly or intentionally.’” Funk’s Br. at 18, 19. In support of his argument, Funk cites to *Taylor v. State*, 820 N.E.2d 691 (Ind. Ct. App. 2005), *vacated by Taylor v. State*, 840 N.E.2d 324 (Ind. 2006), wherein the defendant was convicted of murder under an accomplice liability theory. We held that trial counsel was ineffective for failing to object to a jury instruction that failed to “delineate that the person who was aided, induced or caused to kill had to commit such act knowingly or intentionally.” *Id.* at 695. However, our Supreme Court reversed the Court of Appeals opinion cited by Funk, finding the instruction was not erroneous and that “Taylor’s claim of ineffective

¹ *See Benner v. State*, 580 N.E.2d 210, 212 (Ind. 1991) (“an initial hearing is not a critical stage of the process requiring presence of counsel”).

assistance of trial counsel” in that regard must fail. *Taylor v. State*, 840 N.E.2d 324, 227 (Ind. 2006).

The instruction given at Funk’s trial is as follows:

You are instructed that under the law of the State of Indiana a person who knowingly or intentionally aids, induces or causes another person to commit an offense commits that offense, even if the other person:

1. has not been prosecuted for the offense;
2. has not been convicted of the offense;
3. has been acquitted of the offense.

It is not necessary that the person be separately charged by indictment or information, with knowingly or intentionally aiding, inducing or causing the commission of the offense.

(Ex. 1). Knecht testified that the instruction was a correct statement of the law, and the post-conviction court reached the same conclusion. Furthermore, in *Huspon v. State*, 545 N.E.2d 1078, 1084 (Ind. Ct. App. 1989), an instruction nearly identical to the one given here was found “proper in that it was a near-verbatim copy of” the statute “on assisting a criminal.” Funk has failed to satisfy his burden of establishing grounds for relief in this regard.

Funk also argues that appellate counsel was ineffective for not challenging trial counsel’s failure to object to the “fatally defective” habitual offender “charging information.” Funk’s Br. at 21. His contention appears to be that the fatal defect is that the State’s January 1993 charging information alleged that Funk had accumulated “at least five prior unrelated felony convictions,” but the subsequently amended March 1993 charging information alleged he had accumulated “at least four prior unrelated felony convictions.” *Id.* at 22. Knecht testified that any error in this regard was harmless, a conclusion shared by the post-conviction court – which concluded that because the “later

amendment to the charge was in [Funk]’s favor, therefore he did not suffer any prejudice.” (App. 14). Further, as the post-conviction court concluded, the habitual offender charge “followed the statute and clearly advised [Funk] of the allegations it contained” and “described what the State had to show to obtain a conviction.” *Id.* The post-conviction court did not err when it concluded that Funk had not met his burden of proof here.

Next, Funk argues that he was not given notice of the amendment to the habitual offender charging information in March 1993, “nor . . . given an opportunity to be heard to contest that amendment.” Funk’s Br. at 24. According to Funk, changing the allegation that he had “at least five prior felony convictions” to “at least four prior felony convictions” prejudiced him because it “changed the evidence and [his] defenses” – he “could no longer draw the jury’s attention to the invalid [fifth] conviction and use it to infer [sic] that some of the other alleged convictions were also possibly invalid like the” dropped fifth alleged conviction. *Id.* at 26-27.

Knecht testified that he could not speculate as to why trial counsel did not object to the March 1993 amendment. The post-conviction court found that the amendment was in Funk’s favor and concluded that Funk failed to establish ineffective appellate counsel. We note that Funk cites no authority for the proposition that the State could not strike a conviction from or amend an habitual offender charging information prior to trial. Further, as was made abundantly clear in *Fajardo v. State*, 859 N.E.2d 1201, 1206-07 (Ind. 2007), case law at the time of Funk’s trial and appeal did not clearly forbid an untimely amendment to a charging information. Hence, we cannot find that the evidence

leads unerringly and unmistakably to the conclusion that had appellate counsel argued the failure of trial counsel to object to the March 1993 amendment of the habitual offender charging information, the result of Funk's appeal would have been different.

Finally, Funk argues that he received "ineffective assistance of appellate counsel on his direct appeal, when appellate counsel failed to rise [sic] that Funk was entitled to be sentence [sic] under the 1993 amendment to the habitual offender statute." Funk's Br. at 28. We cannot agree.

Knecht testified that the amendments did not take effect until after Funk's sentencing hearing, and that the amendments were inapplicable to Funk's case. The post-conviction court reached a similar conclusion.

Funk's own brief states that on "April 20, 1993," he "was sentenced to eight years on Count I for the crime of Intimidation as a Class C felony, and that sentence was enhanced by thirty (30) years due to the" habitual offender finding. Funk's Br. at 29. The amended habitual offender statute became effective July 1, 1993. *See* P.L. 164-1993 § 2 (amending Ind. Code § 35-50-2-8). Thus, Funk was sentenced before the effective date of the statute.

We have held that the 1993 amended habitual offender statute "is not ameliorative and does not entitle one who has committed an offense prior to the statute's effective date to be sentenced under the later law." *Lunsford v. State*, 640 N.E.2d 59, 60 (Ind. Ct. App. 1994). A defendant sentenced before the July 1, 1993 effective date must be sentenced pursuant to the habitual offender statute in effect at the time of his offense. *Id.* In *Lunsford*, we also found the amended habitual statute did not "specif[y] that the

amendment should be applied retroactively.” *Id.* at 61. “A defendant who is sentenced prior to the effective date of a statute which contains ameliorative provisions may not take advantage of the ameliorative provisions absent specific legislative intent for retroactive application.” *Rowold v. State*, 629 N.E.2d 1285, 1288 (Ind. Ct. App. 1994). Therefore, appellate counsel was not ineffective for not asserting that Funk was entitled to be sentenced under the 1993 amended statute.

Funk failed to meet his burden, and the trial court did not err when it denied him post-conviction relief.

Affirmed.

RILEY, J., and VAIDIK, J., concur.